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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DANIEL ROY GARCIA, Defendant and Appellant.	E033464 (Super.Ct.No. INF041012) OPINION

APPEAL from the Superior Court of Riverside County. Randall Donald White, Judge. Affirmed.

David L. Polsky, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Jeffrey J. Koch, Deputy Senior Assistant Attorney General, and Robert M. Foster, Supervising Deputy Attorney General, for Plaintiff and Respondent.

Defendant unsuccessfully asserts instructional error.

FACTUAL AND PROCEDURAL BACKGROUND

At approximately 2:00 p.m. on June 24, 2002, Philippe Lageu-Goyette left his Tahoe running while he dropped off clothes at a Cathedral City dry cleaners. He left the store when he saw defendant reach for the door handle of the Tahoe. Defendant entered the Tahoe and locked the doors. As Mr. Lageu-Goyette approached the driver's window, defendant looked him in the eyes, smiled, backed up the Tahoe and drove away. Mr. Lageu-Goyette called 911 and the Cathedral City police arrived about two to five minutes later. The Tahoe had a tracking device that the police activated.

Riverside county Deputy Sheriffs Ammar and Leal were at the corner of Park View Drive and Monterey Avenue in Palm Desert when they received a dispatch that the Tahoe had been stolen and that its tracking device indicated it was heading south on Monterey. Deputy Ammar's tracking device receiver alerted him to the location of the stolen Tahoe and both deputies spotted defendant driving the Tahoe. After the Tahoe passed in front of Deputy Ammar, both deputies pursued it.

During the following 20-minute pursuit, Deputy Zornes saw a person sitting in the front passenger seat whom he later identified as Alex Tovar.

The Tahoe stopped, both front doors opened, one person exited from the driver's door while two others exited from the passenger door. The driver and one of the passengers fled on foot to some nearby street. The other passenger ran around to the driver's side of the Tahoe, got in and drove off. The Tahoe proceeded about a mile before officers stopped it and arrested the driver.

Deputies detained the two who left the Tahoe, one of whom was defendant. The deputies found a spring-loaded center punch commonly used to break car windows in defendant's front pocket. At the sheriff's substation about an hour later, defendant volunteered that he was unable to elude the helicopter.

Defense:

Alexis Tovar testified that he drove the Tahoe from the cleaners. As he was pulling out to drive away, he made eye contact with the owner and smiled at him. The owner was upset and that made Tovar laugh. Tovar picked up defendant and Hernandez. Defendant was in the front passenger seat while Hernandez was in the back seat.

When Tovar saw a police vehicle, he knew he would be stopped so he sped away. Defendant repeatedly asked Tovar to stop, but Tovar refused because he did not want to get in trouble. He drove into the desert, where he stopped and defendant and Hernandez exited. Tovar opened his door to exit, but decided to continue driving. When he stopped later, he did not run because he did not want the officers to shoot him.

When Tovar was arrested, he had credit cards from the Tahoe in his possession. He told the police that he stole the Tahoe and that it was stupid. When the police said that defendant was driving, he responded, "I guess. I'm stupid."

Investigator Nicholas testified the officers could not have identified defendant as the driver during the pursuit because at 60 miles per hour a Tahoe would pass a fixed location in only 0.761 seconds. Since a police car sits lower than a Tahoe an officer would have to look up to see the person driving the Tahoe. The closer the patrol car is to

the Tahoe, the more obstructed the officer's view would be. If the vehicles are proceeding in the same direction, the officer's view would be obstructed because the Tahoe's driver would be higher than the officer's seat. An officer would be unable to determine the height or weight of a person sitting inside a Tahoe.

The jury found defendant was guilty of unlawfully taking the vehicle (Veh. Code, § 10851, subd. (a)) and fleeing from a pursuing officer (Veh. Code, § 2800.2). The court found true the allegations that he had sustained two prior felony theft convictions (§ 666.5, subd. (a)) and had served three prior prison terms (§ 667.5, subd. (b)).

DISCUSSION

On appeal, defendant contends the trial court erred by instructing the jury with CALJIC No. 2.92 that the certainty of an eyewitness identification was a factor in evaluating its believability and with CALJIC No. 17.41.1, which deals with juror misconduct. The contentions lack merit.

1. The trial court did not err by instructing the jury with CALJIC No. 2.92.

At defense counsel's request, the trial court instructed the jury with CALJIC No. 2.92 concerning the factors used when determining the reliability of eyewitness identification testimony. Nevertheless, defendant challenges the propriety of one of the 12 listed factors--"[t]he extent to which the witness is either certain or uncertain of the identification." (CALJIC No. 2.92.) Anticipating the People's response that his attorney requested the instruction and failed to object when it was given, defendant claims ineffective assistance of counsel on the basis that the instruction affected his substantial

rights. Addressing the merits of defendant's contention, we conclude the trial court did not err.

Defendant relies on language in *People v. McDonald* (1984) 37 Cal.3d 351, 369, overruled on other grounds in *People v. Mendoza* (2000) 23 Cal.4th 896, 914, that "the majority of recent studies have found no statistically significant correlation between confidence and accuracy, and in a number of instances the correlation is negative . . . ." However, this language is not a condemnation of the "certainty" factor aspect of CALJIC No. 2.92, and *McDonald* did not involve the propriety of giving the instruction. Rather, *McDonald* addressed the question of the trial court's refusal to permit a defense expert to testify that empirical research had undermined a widespread lay belief that the accuracy of a witness's recollection increases with his or her certainty. (*McDonald,* at p. 362.)

Defendant also relies on *People v. Wright* (1988) 45 Cal.3d 1126, to attack CALJIC No. 2.92, claiming it improperly explains to the jury the impact of the certainty of identification factor. In *Wright,* the Supreme Court recognized that *People v. McDonald, supra,* 37 Cal.3d 351, 369 (overruled on other grounds in *People v. Mendoza, supra,* 23 Cal.4th 896, 914), authorized the use of competing expert witnesses on the reliability of the factors relevant to evaluating eyewitness identification. But, the *Wright* court stated, an instruction about the effect of those factors would be improper and was best left to the examination of experts and argument of counsel. (*Wright,* at p. 1143.) In *Wright,* the Supreme Court held "that a proper instruction on eyewitness identification factors should focus the jury's attention on facts relevant to its determination of the

existence of reasonable doubt regarding identification, by listing, in a neutral manner, the relevant factors supported by the evidence." (*Id.* at p. 1141.) The *Wright* court concluded that CALJIC No. 2.92 "usually provide[s] sufficient guidance on eyewitness identification factors" (*Wright,* at p. 1141) and disagreed "that CALJIC No. 2.92 is 'deficient' for failing to explain the effects of the enumerated factors." (*Wright,* at p. 1141.) Although a defendant is entitled to a special instruction directing the jury's attention to evidence in the record that supports a mistaken identification defense, the instructions otherwise should do no more than list in a neutral manner any factors based on the evidence. (*Id.* at p. 1141.) Neither a proposed special instruction, nor CALJIC No. 2.92, should take a position as to the impact of those factors, as the required explanation "would of necessity adopt the views of certain experts and incorporate the results of certain psychological studies while discounting others. It would require the trial judge to endorse, and require the jury to follow, a particular psychological theory relating to the reliability of eyewitness identifications. Such an instruction would improperly invade the domain of the jury, and confuse the roles of expert witnesses and the judge." (*Wright,* at p. 1141.) Eliminating the certainty factor from CALJIC No. 2.92 would endorse psychological studies that discount or explain its impact. (*Wright,* at p. 1141.) Instead, a defendant is free to put on an expert who might explain the certainty factor according to the defendant's viewpoint. (*Id.* at p. 1142.) Here, five different witnesses identified defendant as the driver of the stolen Tahoe and he was permitted to elicit testimony from Investigator Nicholas regarding the officers' ability to provide a

reliable identification of the driver of the Tahoe during the pursuit.

In *People v. Johnson* (1992) 3 Cal.4th 1183, the defendant contended the trial court erred by including the certainty factor in CALJIC No. 2.92 because the only evidence on the issue came from his expert, who testified that a witness's confidence in his eyewitness identification did not correlate with its accuracy. The Supreme Court rejected the defendant's argument that it contradicted his expert's testimony and thereby implied the jury could not rely on the expert's evidence. The jury also was instructed to consider the expert's testimony and it remained free to reject the expert's testimony although it was uncontradicted. The trial court was neither required, nor permitted, to instruct the jury according to the expert's theory. (*Johnson,* at pp. 1231-1232.) Stating that CALJIC No. 2.92 "normally provides sufficient guidance on the subject of eyewitness identification factors," the *Johnson* court specifically rejected the defendant's argument that instructing the jury on the "certainty" factor was improper. (*Johnson,* at pp. 1230-1231.) In *Johnson,* the California Supreme Court reiterated the conclusion it had reached earlier in *Wright* that CALJIC No. 2.92 is a correct statement of the law. (*Johnson,* at pp. 1230-1231.)

In *People v. Gaglione* (1994) 26 Cal.App.4th 1291, 1301-1303, disapproved on other grounds in *People v. Martinez* (1995) 11 Cal.4th 434, 452, the Court of Appeal rejected the defendant's argument that instructing on a witness's certainty leads the jurors to believe the more certain the witness is, the more likely the identification is correct. The court viewed *Wright* as having expressly rejected this argument and, following

Wright, found no error in giving CALJIC No. 2.92.

Defendant relies on *Manson v. Brathwaite* (1977) 432 U.S. 98, for the proposition that his due process rights were violated because use of the certainty factor allowed the jury to consider unreliable evidence. But the United States Supreme Court listed the witness's certainty when first identifying the defendant as a factor to be considered in determining the constitutional reliability of tainted identification evidence admitted at trial. (*Id.* at p. 114.) Thus, it is improbable that court would find CALJIC No. 2.92 violates a defendant's due process rights because it includes the "certainty" factor among 11 other factors to be considered in evaluating the reliability of a witness's identification.

For the above reasons, the trial court did not err by giving CALJIC No. 2.92.

2. The trial court did not err when it gave CALJIC No. 17.41.1.

For purposes of federalizing the issue, defendant argues the trial court committed prejudicial error when it gave CALJIC No. 17.41.1. However, he recognizes this court is bound by *People v. Engelman* (2002) 28 Cal.4th 436. Accordingly, for the reasons stated in *People v. Engelman*, we reject defendant's claim in this appeal.

Furthermore, here, as in *Engelman,* there is no indication that the instruction affected the jurors' deliberations in any way. Jury deliberations began at 9:45 a.m. on December 12, 2002, and the jury recessed for lunch at noon on that day. Deliberations resumed at 1:05 p.m. and the jury returned a verdict at 2:48 p.m. Consequently, defendant has not shown that the instruction played any role in jury deliberations or that it violated his constitutional rights in any respect.

DISPOSITION

The judgment is affirmed.

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HOLLENHORST
J.

We concur:

RAMIREZ
P. J.

GAUT
J.